Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

No. 78-613

LINDA RUTLEDGE, et al,

Petitioners,

v.

LOWELL LONG, PERSONNEL
DIRECTOR FOR THE STATE
DEPARTMENT OF ADMINISTRATION, et al,

Respondents.

RESPONSE TO BRIEF FILED BY RESPONDENTS

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

LINDA RUTLEDGE, FRANCES D'ANNUNZIO, JANET SKILES, and MARLA SPILLMAN, Individually and on behalf of all persons similarly situated,

Petitioners,

v.

LOWELL LONG, PERSONNEL DIRECTOR FOR THE STATE DEPARTMENT OF ADMINISTRATION,

HENRY SCHWALLER, SECRETARY OF STATE DEPARTMENT OF ADMINISTRATION,

ROBERT HARDER, SECRETARY OF STATE DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES,

W. VAN ALEXANDER, PERSONNEL CHIEF, STATE DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES, and

MEMBERS OF THE FINANCE COUNCIL FOR THE STATE OF KANSAS,

Respondents.

RESPONSE TO BRIEF
FILED BY RESPONDENTS

The Petitioners believe that the Brief by the Respondents requires a short response. Because of erroneous conclusions that might be made on the basis of statements in the Respondents' Brief concerning the allegation that Petitioners had an available administrative remedy, the Petitioners will first turn to that point.

I.

THE PETITIONERS HAD NO AVAILABLE ADMINISTRATIVE REMEDY

The Respondents argue that the Petitioners' claim was denied upon an adequate state ground and rely upon the trial court's holding that the Petitioners failed to avail themselves of appropriate state administrative remedies. However, this ruling cannot bar the Petitioners, as it is clearly erroneous and "without any fair or substantial support". Wolfe v. State of North Carolina, 364 U.S. 177, 185 (1960); N.A.A.C.P. v. Alabama ex rel. Patterson, 357 U.S. 455 (1958); Ward v. Board of County Commissioners, 253 U.S. 17 (1920).

The trial court found that the Petitioners had a statutory remedy under Kan. Stat. Secs. 75-2929 and 75-2940 (1977), which are set forth in their entirety in Appendix A, infra, at 9-10. However, a review of these statutes shows that neither afforded the Petitioners a remedy. Kan. Stat. Sec. 75-2929 simply provides that "(t)he State Civil Service Commission shall hear appeals taken to it pursuant to Sections 75-2940 and 75-2949 . . .". Kan. Stat. Sec. 75-2949, which was not cited by the trial court, allows appeals in cases of dismissal, demotion or suspension of a Civil Service employee and is not, therefore, involved

in this case. Kan. Stat. Sec. 75-2940, which was cited by the trial court, provides, inter alia:

> (1) The director may refuse to examine an applicant, or after examination may refuse to certify an eligible, who is found to lack any of the preliminary requirements established for the examination and for the position or employment for which he or she applies . . . .
> (2) Whenever the director refuses to examine an applicant, or after an examination refuses to certify an eligible, as provided in this section, then the director shall furnish to such applicant a statement of the reasons for such refusal to examine or refusal to certify, as the case may be. In the case of any such refusal an appeal may be taken to the board in accordance with the rules to be adopted in the manner hereinbefore provided. (Emphasis added).

This statute obviously allows appeals in two types of situations, neither of which are involved in this case. First, an appeal can be taken when the Personnel Director of the State Department of Administration refuses to allow an applicant to take a Civil Service examination for a particular Civil Service class; and, second, the statute allows an appeal in the event the Personnel Director refuses to certify a person as being eligible for a position in a Civil Service class after that person has taken the Civil Service examination and been placed on the eligible list for that class. This case neither involves a refusal

to allow any of the Petitioners to take a Civil Service examination for the Social Worker I class, nor the refusal to certify them as eligible for that class. To the contrary, the claims of the Petitioners are grounded upon the fact that they were placed in the proper class, and thereafter denied the benefits of their positions in that class. This was done by designating the Petitioners as Social Worker I-C's while designating others in the same Civil Service class as being Social Worker I-B's. These designations were no more than a means by which to identify and distinguish those such as the Petitioners, who were properly placed in the Social Worker I class, from others who were also properly placed in the same Civil Service class, for the purpose of paying them under different salary ranges. This, of course, was in violation of the Kansas Civil Service Act and regulations and this violation was clearly recognized by the Court of Appeals of the State of Kansas. See Appendix A to the Petition for Writ of Certiorari, at 23, 25. As the Respondent Long clearly stated, these designations constituted no more than a "pay mechanisim" and this fact and the violation resulting therefrom was plainly described in the voluminous testimony given in this case, some of which is set forth in Appendix B, infra, at 11-17.

The trial court also apparently found that a memorandum written by Robert F. Brandt in July of 1970 granted an administrative remedy to the Petitioners. See Appendix B to the Petition for Writ of Certiorari, at 29, 35 and 36. However, in so doing, the trial court did not clearly identify this memorandum, quoted cut of context from the memorandum, and did not mention that another accompanying memorandum

was also written by the Respondent Harder at approximately the same time. Both memoranda are set forth in full in Appendix C, infra, at 18-21. In any event, the trial court's holding, insofar as it is based upon the Brandt memorandum, is again without any fair or substantial support and, therefore, cannot bar the Petitioners. First, these memoranda were no more than an administrative act, which did not grant an appeal authorized by statute or regulation, nor was any remedy whatsoever provided upon taking the purported appeal. Further, the trial court erroneously stated the memoranda provided for appeals to the Kansas Civil Service Commission which is the body that hears and determines Civil Service appeals. However, in point of fact, this was not the case and it is clear from the language of the memoranda that appeals could not have been taken to any state entity empowered by statute or regulation to hear and resolve disputes according to recognized or established procedure. Thus, these memoranda did not make available a remedy of the nature contemplated by the exhaustion doctrine or by the cases relied upon by the Respondents, Gordon v. Harder, 211 Kan. 611, 507 P.2d 341 (1973) and Thompson v. Amis, 208 Kan. 658, 493 P.2d 1259 (1972). In fact, these decisions, by contrast, support the Petitioners' claim that they did not have an available adequate administrative remedy. See also, Rosenfield v. Malcolm, 55 Cal. Rptr. 505, 421 P.2d 697 (S.Ct., 1967).

Second, and just as importantly, when the memoranda are read in their entirety, it is clear that they prohibited rather than allowed a purported appeal of the decision to assign multiple salary ranges to the

Social Worker I Civil Service class. The memorandum written by the Respondent Harder specifically stated that ". . . appeal(s) based upon factors such as recommended salary range, employee qualifications or employee work history will not be considered . . ." and it also stated "(e)mployee appeal will be limited to reason for disagreeing with recommended classification of position." (Emphasis added). The memorandum prepared by Robert F. Brandt, after setting forth areas where no appeal would be allowed, stated that the only appeal which could be taken would be one based upon "allocation of position classification." Thus, the only appeals allowed under the memoranda were ones involving a claim by a Civil Service employee that he was allocated or placed in the wrong class. However, as stated, the basis of the Petitioners' claim is that they were placed in the proper class, but denied the benefits of that class because of the assignment of multiple pay ranges thereto, which was, according to the memoranda, a matter that could not be appealed. Consistent with these memoranda, as well as the appropriate Kansas statutes, employees in the Social Worker I class were told by their superiors that they had no right to appeal the assignment of multiple salary ranges to the Social Worker I class which was the Civil Service class to which they had been properly allocated.

A final important point is that the memoranda and the purported appeal allowed therein were not even applicable to some of the Petitioners such as Linda Rutledge, as the time limit in which their complaint could have been made, as specified in the memoranda had long since lapsed when they were first employed.

The Respondents, in their Briefs filed with the Court of Appeals of the State of Kansas, did not even attempt to point out the administrative remedy claimed to have been available to the Petitioners, notwithstanding the prior decision of the trial court. Likewise, they have not made such a showing to this court. The reason is, of course, that the Petitioners have never had an available administrative remedy and the trial court's ruling to the contrary was without basis in law or fact.

II.

RELIANCE UPON THE TESTAN DECISION BY THE RESPONDENTS IS MISPLACED

The Respondents rely upon United States v. Testan, 424 U.S. 392 (1976) as being supportive of their position. However, Testan, when viewed in the context of this case, is authority that can be relied upon by the Petitioners. In Testan, the Respondents were Federal Civil Service employees seeking to be reclassified to a separate and higher Civil Service class, which is contrary to the situation in the present case. The Testan Respondents also brought a direct action against the United States based upon a theory of Constitution entitlement. However, in this case the Petitioners are relying upon a contract between the United States and the State of Kansas, and in this regard, it should be noted that the Testan court specifically commented that ". . . (t)he respondents do not rest their claims upon contract . . .", 96 S.Ct. at 954. The Testan court also stated ". . . (t)here is no claim here that either respondent has been denied benefit of the position to which he was appointed . . .", 96 S.Ct. at 955. Without question,

the distinguishing factors carefully mentioned by the court in Testan are pivotal to the resolution of this case and, thus, the Petition for Writ of Certiorari should be controlled by the principles previously relied upon by the Petitioners.

III.

CONCLUSION

In this case, there is no question that a substantial, continuing, long-standing violation of the Kansas Civil Service Act and regulations occurred and that the Petitioners were injured as a result of that violation. In fact, the Respondents make no real contention to the contrary. Further, the Respondents do not seriously attempt to respond to the clear evidence showing that Kansas, through its appropriate officials, had knowledge of this violation but took no corrective action. Finally, there is no question that this violation was also a violation of a Federal contractual condition imposed upon Kansas when it accepted Federal funding. Notwithstanding these facts, the Kansas courts have refused to grant the Petitioners either retroactive or prospective relief. However, because of the Federal question involved and the Plaintiffs' standing to present that question, it is respectfully submitted that this court should grant a Writ of Certiorari as requested.

Respectfully submitted,

JAMES Z. HERNANDEZ
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Wichita, Kansas 67202
Counsel for Petitioners

APPENDIX A

KANSAS STATUTES INVOLVED

Kan.Stat.Sec. 75-2929. Hearing of appeals by commission; rules and regulations.

The state civil service commission shall hear appeals taken to it pursuant to K.S.A. 75-2940 and 75-2949 or any amendments thereto, and shall conduct hearings and pass upon complaints by or against any officer or employee in the classified service for the purpose of demotion, suspension, removal, or dismissal of such officer or employee, in accordance with the provisions of this act and acts amendatory thereof or supplemental thereto. The secretary of administration, with the approval of the state finance council, shall adopt rules and regulations, as provided in K.S.A. 75-3706, relating to the foregoing.

* * * *

Kan.Stat.Sec. 75-2940. Powers of director; exclusion of disqualified persons; appeal.

(1) The director may refuse to examine an applicant, or after examination may refuse to certify an eligible, who is found to lack any of the preliminary requirements established for the examination for the position or employment for which he or she applies; or who is physically so disabled as to be rendered unfit for the proper performance of the duties of the position to which he or she seeks appointment; or who is addicted to habit-forming drugs or is an habitual user of intoxicating liquors to excess; or who has been guilty of any crime involving moral turpitude or of in-

famous or notoriously disgraceful conduct; or who has been dismissed from the public service for delinquency or misconduct; or who has made a false statement of any material fact; or who directly or indirectly shall give, render or pay, or promise to give, render or pay, any money, service, or other valuable thing to any person for, or on account of, or in connection with, his or her test, appointment, or proposed appointment; or who practiced, or attempted to practice, any deception or fraud in the application, in the certificate, in the examination, or in securing eligibility or appointment; or who refuses to furnish testimony as required in K.S.A. 75-2932.

(2) Whenever the director refuses to examine an applicant, or after an examination refuses to certify an eligible, as provided in this section, then the director shall furnish such applicant a statement of the reasons for such refusal to examine or refusal to certify, as the case may be. In the case of any such refusal an appeal may be taken to the board in accordance with the rules to be adopted in the manner hereinbefore provided.

APPENDIX B

The following is taken from the Record on Appeal to the Court of Appeals of the State of Kansas.

The Respondent Long is the Personnel Director for the State of Kansas and, in such position, is responsible for the general administration of the State Civil Service Act and Regulations. He testified as follows:

Q. Is Social Worker I-C, as you used to know them, a position?

A. No.

Q. Is it a class?

A. Social Worker I is a class.

Q. Then I take it Social Worker I-C is not a separate class--let me put it another way. Does the State of Kansas, has it ever had a class under the Civil Service Act for classified employees known as Social Worker I-C?

A. No.

Q. Now, was there a single job description for Social Worker I-C?

A. Try the question again another way. I'm not sure I can answer that.

Q. Was there a job description for Social Workers I-C that pertained only to Social Workers I-C?

A. No, not that I know of.

Q. There was a job description that pertained to Social Workers I, though, was there not?

A. That was a class specification that pertained to Social Worker I, and this would have been supported by individual job descriptions of positions allocated to the class of Social Worker I.

(Vol. II, Rec. on App., Long depo., at 36, line 22--37, line 20.)

* * * *

Q. Now, is--is a Social Worker I-C, does he occupy a position in the class known as Social Worker I?

A. Yes.

Q. And did a Social Worker I-B occupy a position in the class known as Social Worker I?

A. Yes.

Q. And did a Social Worker I-B occupy a position in the class known as Social Worker I?

A. Yes.

(Vol. II, Rec. on App., Long depo., at 210, lines 15-21.)

* * * *

Q. (By Mr. Woodard) Let me ask you, I'll rephrase it. Since you have been in office, what authority are you aware of that would justify the assignment of two salary ranges for the same class?

A. The only authority that I would be familiar with would be the specific action of the State Finance Council authorizing or directing.

Q. Taking into consideration the definition of class, what authority under the regulations, what regulations would authorize it?

MR. PITNER: Same objection.

Q. (By Mr. Woodard) Since you have been in office.

MR. PITNER: I'll object to that as being irrelevant as what was done at the time.

Q. (By Mr. Woodard) Okay. Go ahead.

A. I think if the attorney is going to object--

MR. PITNER: No, go ahead and answer. I'm just saving my objection.

A. I'm not familiar with any.

Q. (By Mr. Woodard) Actually, the same salary range is supposed to be applied to, one salary is supposed to be applied to each class, isn't it, isn't that your understanding?

A. Yes.

(Vol. II, Rec. on App., Long depo. at 52 line 12--53 line 9.)

* * * *

The Respondent VanAlexander is the Personnel Director for the Kansas Department of Social and Rehabilitation Services and, in his position, had the duty of implementing the Kansas Civil Service Act and Regulations within that agency. He testified as follows:

Q. Social Worker I-B and Social Worker I-C or what used to be a Social Worker I-C, those were positions within a class, is that correct?

A. No, the Social Worker I is a classification and Social Worker I-C and I-B had a different salary range assigned within that Social Worker I Class.

Q. Was a Social Worker I-B a separate class?

A. No.

Q. Was a Social Worker I-C a separate class?

A. No.

Q. They were both the same class?

A. Two salary ranges assigned to one class.

(Vol. II, Rec. on App., VanAlexander depo., at 10, line 19--11, line 6.)

* * * *

Q. And so the people in the class are doing, in one class are--strike that. People are assigned to a class based on what they--

what type of work they were doing, right?

A. That's right.

Q. And actually one pay range is supposed to be assigned to a particular class, only one?

A. That's the normal procedure, yes.

Q. Well, that's what the regulations require, isn't it?

A. Yes.

(Vol. II, Rec. on App., VanAlexander depo., at 48, line 25--49, line 10).

* * * *

Herb D. King, during the period in question, was the subordinate of the State Personnel Director who had the initial and primary responsibility for developing Civil Service classes and assigning positions thereto. He testified as follows:

Q. Okay. How do you--let me ask you this. On a day-to-day basis, your section primarily dealt in matters of classification, didn't they?

A. Yes, sir.

Q. Okay. On a daily basis no one in the whole State government dealt more with classification under the Civil Service Act than your section, did it?

A. Would you restate that?

Q. Do you know if any other agency or division of an agency or department in an agency that had to deal with classification under the Civil Service Act and legislation to a greater extent than your section had to? That was the function of your section?

A. That's correct. And when they established new positions or restructured positions we define those positions and designated forms and submitted them to us for a review and for determination as to the most appropriate class.

Q. In your opinion, was it proper and I'm not asking about anything to do with salary ranges, but I want to ask in terms of job duties and responsibilities, in your opinion as the head of that section, was it proper to include a Social Worker I class those persons who were categorized as C's and those persons who were categorized as B's?

A. Is your question was it proper to include the C's in the I-B's?

Q. Into the same class.

MR. PITNER: I'll object. There was not proper foundation laid as to the actual origin of the Federal workers--of the individuals assigned.

Q. (By Mr. Woodard) Okay. You can answer, if you can.

A. Yes, I believe it was proper.

Q. That was in terms of job responsibilities and duties, is that correct?

A. On the basis that from position classification point of view, there was one class--one class only and at that level that describes substantially the same kind of level of work.

Q. Okay. Right. So, from that standpoint--from job duties and responsibilities, this doesn't involve a case of improper classification does it?

A. It wouldn't seem so to me.

Q. The problem is what we're talking about is whether you can apply the salary range?

A. Yes.
(Vol. II. Rec. on App., King depo., at 54, line 15--56, line 8).

* * * *

Q. (By Mr. Woodard) And your opinion, do the Civil Service Regulations require one salary range being assigned to each class?

A. Yes.
(Vol. II, Rec. on App., King depo., at 33, line 24--34, line 2.)

* * * *

APPENDIX C

The following is taken from the Record on Appeal to the Court of Appeals of the State of Kansas.

DATE: July 2, 1970

TO: All Agency and Department Heads

FROM: Robert F. Brandt, Executive Director Department of Administration

SUBJECT: Appeal Procedure for Position Allocations Resulting from Public Administration Service (PAS) Study

The Public Administration Service (PAS) has completed its classification and pay study and the State has received their final recommendations. This notice will set forth the procedure to be followed for all employees desiring to appeal the recommendations of Public Administration Service insofar as position allocation is concerned.

Any classified or classified exempt employee desiring to appeal the allocation of his position should fill out the prescribed form, sample of which is attached, setting forth all the required information indicated as well as his reasons for disagreeing with the proposed allocation of the position. It should be emphasized that this appeal procedure does not concern recommended pay scales or the employee's personal qualifications or work history.

It is not necessary for an appellant to submit copies of his original questionnaire or any correspondence which has been directed in the past to Public Administration Service, as all of this material will be

available to the appeal board for its consideration. Any appeal that is based on factors other than allocation of position to classification will not be considered by the appeal board and will be returned to the originator as disapproved. All appeals should be addressed to the Personnel Director, Department of Administration, 801 Harrison Street, Topeka, Kansas 66612, and the notice Position Allocation Appeal should also be written on the face of the envelope. All appellants will be notified of the Board's decision.

It is anticipated that the appeal board will be appointed by duly authorized state officials in the very near future and will be in session between July 15 and August 15, 1970. Further information concerning this procedure will be issued if necessary.

Copies of this memorandum should be reproduced by all agencies and utmost care should be taken to ensure that all employees have had an opportunity to read its contents.

Thank you.

(Signature)
Robert F. Brandt

(Vol. I, Rec. on App., Affidavit of Lee H. Woodard, at 107).

* * * *

July 9, 1970

To: County Welfare Directors

Re: Appeal Procedure for Position Allocations Resulting from Public Administration Service (PAS) Study

Attached is a copy of a letter from Robert F. Brandt, Executive Director, Department of Administration.

We wish to re-emphasize the following statements in this letter:

1. A copy of the attached letter be made available to each employee.

2. Employee appeal be submitted on a reproduced copy of the attached appeal form.

3. Employee appeal be limited to reasons for disagreeing with recommended classification of the position. An appeal based upon factors such as recommended salary range, employee qualifications, or employee work history will not be considered by the appeal board and will be returned as disapproved.

4. A copy of the original position classification questionnaire which was previously submitted and any other correspondence to Public Administration Service should not be resubmitted. This material will be available to the appeal board.

5. Appeal form should not be mailed later than July 17, 1970.

6. Address appeal envelope as follows:

   Personnel Director
   Department of Administration
   801 Harrison Street
   Topeka, Kansas 66612

Position Allocation Appeal

7. The position classification appeal board will be in session between July 15 and August 15, 1970.

8. The employee appealing will be notified of the decision of the appeal board.

Sincerely yours,

(Signature)

Robert C. Harder
State Director of
Social Welfare

RCH:cad
Attachment

(Vol. I, Rec. on App., Affidavit of Lee H. Woodard, at 107).

AFFIDAVIT OF SERVICE

JAMES Z. HERNANDEZ, being first duly sworn, deposes and states:

That in accordance with Rule 33(2)(e), Supreme Court Rules, he has forwarded three (3) copies of this Response to Brief Filed by Respondents and three (3) copies of this Affidavit of Service to the following:

Mr. Darrell McNeil
Office of the Chief Attorney
Department of Administration of the State of Kansas
Second Floor, Statehouse
Topeka, Kansas 66612

Mr. Curt T. Schneider
Attorney General for the State of Kansas,
and,
Mr. Donald E. Jensen
Assistant Attorney General
Kansas Judicial Center
Topeka, Kansas 66612

Mr. Bruce A. Roby
Legal Division
Department of Social and Rehabilitation Services for the State of Kansas
State Office Building
Topeka, Kansas 66612

James Z. Hernandez

JAMES Z. HERNANDEZ
600 Century Plaza Building
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(316) 263-4958
Attorney for Appellants

Subscribed and Sworn to before me this 16th day of November, 1978.

SAUNDRA J. PARKS
Sedgwick County, Ks.
My Appt. Exp. 9-26-80

Saundra J. Parks

Saundra J. Parks,
Notary Public

My Term Expires:

Sept 26, 1980